David A Kirby 03/25/2009 10:37:26 AM From DB/Inbox: David A Kirby

Cable
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To: SECSTATE WASHDC - ROUTINE

Action: IO

From: USMISSION GENEVA (GENEVA 257 - ROUTINE)

TAGS: ETRD, USTR, WTRO

Captions: USDOC

Subject: SPECIAL SESSION OF THE TRIPS COUNCIL MARCH 5, 2009

Ref: None

Additional Addressees:
None

cc:
DEPT OF AGRICULTURE WASHINGTON DC
USDOC WASHDC
WORLD TRADE ORGANIZATION COLLECTIVE

Distribution:

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ACTION IO-00

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TO SECSTATE WASHDC 8207
INFO WORLD TRADE ORGANIZATION COLLECTIVE
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UNCLAS GENEVA 000257

EEB/TPP/MTAA FOR CRAFT
PASS USTR FOR ROHDE
USDA/FAS FOR ONA
USDOC FOR ITA
USDOC PASS USPTO FOR LOIS BOLAND

E.O. 12958: N/A
TAGS: ETRD WTRO USTR
SUBJECT: SPECIAL SESSION OF THE TRIPS COUNCIL MARCH 5, 2009

Summary: This cable reports on the Special Session of the TRIPS Council held on March 5, 2009, for which there were two agenda items: Negotiation on the establishment of a multilateral system of negotiation and registration of geographical indications for wines and spirits; and other business. The session focused on responses by the EC to questions about its co-sponsored proposal (TN/C/W/52) that were answered informally in December, and requests by Members for further responses and clarification. These questions dealt primarily with legal effects of the registration of a Geographical Indication, mandatory participation by all Members, administrative burdens and costs, practical effects of the register, special and differential treatment and the concept of priority. The EC responded that whether a GI is protected in a country would be decided under that country's domestic regime; that participation would be mandatory for all Members (even those with no export market for wines or spirits) because eventually the higher level of protection accorded GIs for wines and spirits would be extended to other products; that the administrative burden and cost for implementing this system would be de minimis, both for the WTO and Members; and that special and differential treatment would be addressed after the key concepts were established. As for the question from the United States on priority, the EC requested engagement in a bilateral dialogue to fully understand the concern. The EC did not respond directly to the questions related to practical effects of the Register. India, China and Brazil stressed the importance of parallel treatment of extension and TRIPS/CBD. The Chair recalled that Members wished to intensify negotiations and, at the end of the session, asked that inter-sessional meetings be held; and that a formal Special Session be held after the next TRIPS Council in June. End summary.

The Chair announced at the beginning of the meeting that on March 2, 2009, he consulted with about fifteen Member delegations and invited those not included in those consultations to make interventions, in informal mode, if they wished. There being none, the Chair announced that the meeting would proceed in formal mode.

He recalled that in the October 2008 Special Session Members requested discussion of technical issues. At that time, the EC clarified that the TN/C/W/52 ("W/52") paragraphs 1 through 3 reflect the position of the EC and its co-sponsors on the GI Register for wines and spirits-(the sole mandate of the Special Session). Then, in informal sessions of the Special Session, on December 4 and 5, 2008, the EC verbally provided answers to questions from co-sponsors of the Joint Proposal and from Singapore; and subsequently provided written responses to these questions to all delegations by fax on February 25, 2009. In response to the EC's request on March 2nd that additional questions to their responses be provided prior to the Special Session on March 5th, New Zealand and Canada submitted additional questions. Australia, the United States, and other Joint Proposal co-sponsors noted that additional time would be needed to review fully the EC Responses but that preliminary reactions will be provided by or during the Special Session. The Chair invited the delegations to have a full and wide-ranging discussion on legal effects of the registration of a Geographical Indication, notification and registration processes, and other elements.

The EC (Luc Devigne) began by reiterating that the W/52 proposal is co-sponsored by 108 Members, who fully support the three paragraphs on the Register. He commented that this is the only proposal that includes a development dimension-to which Canada later responded

that the Joint Proposal does not need a development dimension because the proposal does not require mandatory participation by all Members. Devigne answered questions that were initially answered in December 2008, by reminding everyone that legal effect would be determined within the framework of each domestic system-whether as an administrative process or a judicial one. He also said that their proposal no longer includes an international opposition component-(which would have allowed interested parties to prevent inclusion of a GI on the register by the country of origin)-and that this provision was eliminated at Members' request. Canada and Australia later asked how Members could be sure that the designations placed on the Register actually qualified as GIs. Additionally, what type of information would be required to show a designation was protected in the country of origin? Further questions dealt with sub-appellations of origin.

In response to what "rebuttable presumption" means in the context of W/52, Devigne said that if a designation is on the Register it is a GI as defined by Article 22.1; and it is left to the country where protection is denied to prove that it is not a GI-for example, because it is generic in the country where protection is sought. He added that all the exceptions provided in TRIPS would still apply under the W/52 proposal; and that participation would be mandatory under the proposal.

Canada, New Zealand and others said that they were interested in market and practical effects and pointed to areas where the EC's responses still did not clarify how their proposal would work in practice. They also stressed that placing a greater evidentiary burden on countries where protection is sought defies existing jurisprudence by shifting the burden of proof. Many co-sponsors of the Joint Proposal expressed their discomfort with the mandatory nature of W/52 and asked that co-sponsors of W/52 confirm that they support mandatory participation in the GI Register for wines and spirits, especially those who do not have an export market for these products. The EC responded that the effect of their proposal is to facilitate the right holder's ability to protect its GI. Devigne further noted that this proposal does not increase obligations of Members because there is already an obligation to protect GIs under TRIPS.

Ecuador, Costa Rica and other co-sponsors of the Joint Proposal expressed concerns for developing countries; and also pointed out disregard for the basic tenet of territoriality. El Salvador and Guatemala said that the system must be voluntary. Australia said it views W/52 as a considerable administrative burden-requiring thousands of foreign GIs to be protected. The question of what legislative, regulatory and other changes must be implemented to accommodate this proposal, needs to be explored as well. Most importantly, W/52 essentially can result in granting monopolies to GI right holders on once-generic products, resulting in higher costs to consumers. There is a need to see a fully-developed proposal; it is important for the details not to be left until later. Chile supported all the statements of the Joint Proposal co-sponsors and asked for a legal text to be submitted by the EC making it easier to analyze and compare with the other proposals. So much time has gone by since the EC has introduced this proposal; prior versions were "beyond the pale." Chile reiterated that a voluntary system-as put forth in the Joint Proposal-is the best form of special and differential treatment for developing countries.

The U.S. intervention repeated the concerns expressed by other Joint Proposal co-sponsors, including with respect to territoriality, legal consequences, concern regarding mandatory participation and the administrative burden and further requested clarification on how the EC proposal addresses the concept of "priority." The question posed on the priority issue was whether placement of a GI on the Register conferred any date of priority. The U.S. model was put forth explaining that in order to obtain a priority date in the United States, a party must file an application; use the designation in commerce that is regulated by Congress; or establish reputation as measured by the U.S. consumer. Devigne left the room after the intervention; and when he returned to answer the intervention, he described the U.S. intervention incorrectly, including improperly attributing comments to the United Stated that were not part of the U.S. intervention, and based on these misstatements called the United States unsophisticated in its knowledge and claimed the United States is trying to make everyone adopt a trademark system, a position "the United States lost fifteen years ago." The United States responded politely to the EC's response by explaining again the concept of priority and requested clarification on how the EC proposal would address the question of priority. Devigne noted he could not answer the question and suggested the EC and the United States engage in a bilateral dialogue on the issue so that the EC could better understand the concept.

Another question centered on how a GI would be removed from the register; which the EC said was up to the country of origin to decide. As to questions concerning administrative burdens and costs, the EC said that all the remaining issues would be discussed after the key policy choices have been made. However, Devigne said that administrative costs would be de minimis to the WTO and, as for national costs, since countries are already protecting GIs, there should not be a noticeable increase there either.

As for W/52 co-sponsors, India referenced resumption of consultations with DG Lamy under the Hong Kong Declaration on issues of GI Extension and TRIPS/CBD. China took issue with the points raised by the Joint Proposal co-sponsors and added that the issues of the Register, extension and TRIPS/CBD are politically and technically ripe and should be dealt with in parallel. Brazil emphasized that parallel treatment of the Register, extension and TRIPS/CBD is essential.

The Chair commented that the discussions have been excellent. Under "Future Work," he proposed continuing technical work with capital-based experts at the next formal meeting in June on the margins of TRIPS Council. He suggested engaging informally two or three times before then. The EC fully agreed to inter-sessional meetings. The United States and New Zealand asked the W/52 co-sponsors to submit a formal written proposal to address the ambiguity of what is actually on the table; Chile said that although

we cannot force the EC to submit a legal text, it would be helpful for developing countries. Other requests included information about Special and Differential Treatment; discussion of the joint proposal; and how trading partners would implement the register within their national systems. The Chair concluded the session announcing that the next Special Session will be held after TRIPS Council, on June 10, 2009.

ALLGEIER